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Supreme Court U.S.
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NO. 95-1605

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ,
AND MARIO PEREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARIO PEREZ' BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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MARIO PEREZ' BRIEF IN OPPOSITION

Respondent, Mario Perez, by and through his Court Appointed counsel, hereby respectfully submits the following in opposition to the United States' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

FEDERAL SENTENCING GUIDELINES

United States Sentencing Commission Guidelines, (Nov. 1993) Section 5G1.3(b)(c) (hereinafter "Sentencing Guidelines"), provides:

- (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
- (c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT

The Respondent Mario Perez ("Perez") submits the following statement.

Perez was arrested in the State of Florida on April 23, 1991 pursuant to an arrest warrant issued by the Second Judicial District Court, County of Bernalillo, State of New Mexico under CR. NO. 91-0776. An Indictment had been returned charging the defendant with Armed Robbery, Attempt to Commit Armed Robbery of Marijuana, Conspiracy to Commit Possession of Marijuana Over eight ounces, and Eluding an Officer. On February 11, 1992, a jury returned guilty verdicts on the charges. Perez was sentenced to seventeen years imprisonment which included Firearm Enhancement one year for each offense, excluding Eluding an Officer pursuant to Section 31-18-16 NMSA, 1978, and placed in custody.

On May 8, 1992, a Federal Grand Jury returned a six-count Indictment under CR. NO. 92-236 JC . charging Perez with Count I, Conspiracy to Possess with Intent to Distribute Less than 50 Kilograms of Marijuana, in violation of 21 U.S.C. Section 846; Aiding and Abetting, 18 U.S.C. Section 2; Count II, Carrying or Use of a Firearm During or in Relation to a Drug Trafficking Crime in violation of 18 U.S.C. Section 924 (c)(1), 18 U.S.C. Section 924 (a)(2) and Aiding and Abetting, 18 U.S.C. Section 2; Count VI, Possession with Intent to Distribute Less Than 50 kilograms of Marijuana in violation of 21 U.S.C. Section 841 (a)(1) and 21 U.S.C. Section 841 (b)(1)(D).

On June 11, 1993, the United States Attorney for the District of New Mexico filed an Enhancement Information charging the defendant with prior felony convictions.

The Federal Indictment was based on the identical set of facts as the state charges and subsequent convictions.

On June 18, 1993, pursuant to a jury trial before the United States District Court for the District of New Mexico, Perez was found guilty to Counts I, II, and VI, of the Indictment and sentenced to a term of imprisonment of 12.25 years, including 5 years for the use of a firearm.

The Tenth Circuit has held that a combined reading, under which the five-year sentence on the Section 924(c) gun count would have to follow a previously imposed state sentence and would have to precede a corresponding federal sentence would be a total of 29.25 years for Perez. The Tenth Circuit has held that "this approach would more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in by these defendants".

RESPONDENT RESPECTFULLY REQUESTS THAT THE PETITION BE DENIED

The United States prays that the petition be granted because it submits that the Tenth Circuit's opinion is inconsistent with that of the Eleventh and Sixth Circuits (Petition at pg. 7) and further that because 18 U.S.C. 924(c) is an important and widely used statute, the court of appeals' error calls for correction by this Court.

Perez incorporates by reference the Briefs in Opposition submitted by co-respondents counsel, Edward O. Bustamante, Esq., on behalf of Miguel Gonzales and Angela Arrellanes, Esq., on behalf of Orlenis Hernandez-Diaz.

I. Perez submits that the Tenth Circuit holding in this case is based only on the unique facts relevant to the case and does not have broad implications sufficient to warrant a grant of the Petition.

The Tenth Circuit in its opinion interpreted the statute as follows:

Where a literal reading of the statutory language would produce an absurd result- particularly one clearly not contemplated by Congress- Courts will adopt a more sensible statutory construction. Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892).

Where a literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope.... Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intent.

Perez submits that the intent of the statute was not for the purposes of exposing individuals to sentences duplicative to state sentences where firearm enhancements already attached. As above described, Perez' state sentence was enhanced one year for Counts 1, and 2, Armed Robbery, Count 3 Armed Robbery of Marijuana, Count 4, Conspiracy to Commit Armed Robbery, Count 5, False Imprisonment. Clearly, the imposition of the 924 (c) to be consecutive to the state sentences increasing the total of 10 years is precisely the type of anomaly and absurd result which the Tenth Circuit concludes was not intended by Congress. The United States has not presented any authority or set of

facts which are remotely similar to this case. Accordingly, to suggest that this decision has broad implications is without merit.

II. The Tenth Circuit correctly holds that the statute applies to any other federal term of imprisonment.

The Tenth Circuit concludes that the phrase "any other offense" encompasses only federal offenses is required if they are to follow Congress' stated intent that Section 924(c) sentences be served prior to "any other offense," for if a defendant is sentenced in state court first, there is no way in which a later-sentencing federal court can reuse the mandatory five-year Section 924(c) sentence to be served before a state sentence that is already being served.

As stated above, Perez has been serving the state sentence since his arrest on April 23, 1991. Accordingly, the federal imposition of a consecutive term for the Section 924(c) violation is inapplicable.

III. The Tenth Circuit is correct in finding that the District Court's application of a consecutive sentence for the 924(c) is "anomalously" harsh and that the application of Sentencing Guidelines Section 5G1.3 provides for a concurrent sentence

Perez submits that the only applicable section for consideration is Section 5G1.3(b). Subsection (a) is not applicable to this case as Perez did not commit the offense while serving a term of imprisonment, or after sentencing for , but before commencing service of such term of imprisonment. Accordingly, pursuant to the Sentencing Guidelines, Subsection (b) is applicable if subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment. Furthermore, Perez submits that subsection (c) is particularly applicable in that the court may impose a sentence

concurrently to achieve a reasonable punishment and avoid unwarranted disparity. Perez respectfully submits that the Tenth Circuit's review of all of the circumstances and in particular the unduly harsh results that attach warrant the finding of concurrent sentencing.

Finally, Perez respectfully submits that the imposition of consecutive sentencing by the District Court is tantamount to cruel and unusual punishment. While the Tenth Circuit did not address this constitutional right, Perez submits that under the totality of the circumstances consideration of the Eighth Amendment by this Court is warranted. The Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits punishment grossly disproportionate to the severity of the offense. Ingraham v. Wright, 430 U.S. 651 (1970). Perez does not argue that standing alone, the Section 924(c) consecutive sentencing provision is disproportionate to the offense. As noted by the Tenth Circuit, "the adoption of a reading that Section 924(c) prohibition against concurrent sentences refers only to federal sentences does not at all deprecate the severity of the crimes involved." Perez argues that imposition of Section 924(c) firearm enhancement to an already state statute attaching firearm enhancement results in a grossly disproportionate sentence and unduly harsh.

In Solem v. Helm, 463 U.S. 277 (1983), the Supreme Court posited three criteria for analyzing the proportionality of sentences: (1) a comparison of the gravity of the offense with the harshness of the penalty; (2) a comparison of the sentence with those imposed for various offenses in the same jurisdiction; and (3) a comparison of the sentence with those imposed for the same or similar offenses in other jurisdictions. Solem, 436 U.S. at 292.

Perez respectfully submits that the sentences imposed by the District Court and the consecutive five year term as provided by Section 924(c) establishes a term of imprisonment which is incomparable to any other sentences for similar criminal acts in the same or other jurisdictions. As the Tenth Circuit noted in its decision, if the consecutive provisions of the sentencing guidelines are imposed, Perez and co-respondents would be sentenced to more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in.

Perez respectfully submits that the Tenth Circuit's Vacation of the sentences imposed are consistent with the intent of Congress as provided for by the authorities of the Sentencing Guidelines as well as Section 924(c).

CONCLUSION

For the foregoing reasons, this Court should deny the United States' Petition for a Writ of Certiorari.

Respectfully submitted:


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CERTIFICATE OF SERVICE

This certifies a true and accurate copy of this Brief In Opposition to Petition for Certiorari was sent by first class mail to the following interested parties on May 31, 1996, at the last known addresses:

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May 30, 1996

Mr. William Suter
Clerk of the Court
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Re: U.S.A. v. MARIO PEREZ, No. 95-1605

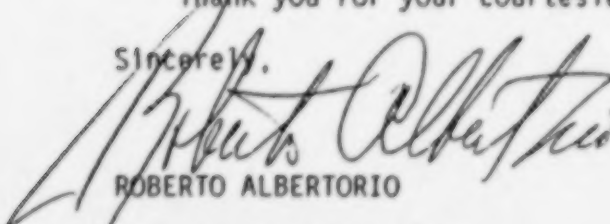
Dear Mr. Suter:

Please accept this letter as a request for an extension to the deadline in which to file the brief in opposition to the petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The Petition was filed April 5, 1996, by the Office of the Solicitor General. Pursuant to S. Ct. Rule 15.2 a brief in opposition was due 30 days thereafter. The deadline expired May 6, 1996. Counsel has been in United States District Court in the United States vs. Richard Haworth, et. al., Criminal No. 95-491 LH in which his client is one of seventeen defendants. Trial on this matter has been scheduled for August 1996, which has been preceded by numerous motions before the Court as well as numerous scheduling conferences. In addition, counsel serves as a Zoning Hearing Examiner/Administrative Judge and during the months of April and May of 1996, was required to preside in over eighty administrative hearings.

Due to the press of business, counsel was unable to file the brief in opposition and respectfully request to June 6, in which to do so. If there are any questions or concerns, please contact me.

Thank you for your courtesies.

Sincerely,



ROBERTO ALBERTORIO

cc: Drew S. Days, III
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